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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. BAHSSON SMITH, Defendant and Appellant.	A139230 (Alameda County Super. Ct. No. C164174)

In 2012, a jury convicted defendant Bahsson Smith of one count of first degree murder and found true an enhancement allegation that he personally and intentionally discharged a firearm causing death based on the 2006 killing of Keith Stephens.[1] The trial court sentenced Smith to prison for an indeterminate term of 50 years to life, composed of a term of 25 years to life for the murder and a consecutive term of 25 years to life for the personal-discharge enhancement.[2]

Smith claims that his conviction must be reversed because (1) his trial counsel failed to present certain evidence supporting the defense theory that another man, Kamasa Palmer, shot Stephens; (2) the prosecutor falsely told the jury that Palmer's clothes had never been tested for gunshot residue (GSR); (3) the trial court admitted

[1] Smith was convicted of murder under Penal Code section 187, subdivision (a), and the personal-discharge allegation was found true under Penal Code sections 12022.7, subdivision (a) and 12022.53, subdivision (d). All further statutory references are to the Penal Code unless otherwise noted.

[2] The trial court also determined that Smith had four prior convictions resulting in a prior prison term under section 667.5, subdivision (b) but stayed those enhancements.

certain recordings of Smith's jailhouse telephone calls and visits; (4) his trial counsel failed to seek a mistrial based on the prosecutor's closing comments on Smith's character, as revealed in those recordings; (5) the court failed to give sua sponte an instruction on voluntary manslaughter based on a sudden quarrel or heat of passion (heat-of-passion instruction); (6) a juror was questioned outside his presence; and (7) cumulative error occurred.

We conclude that Smith has failed to establish legal error, prejudice, or both as to all of his claims. We therefore affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

A. The Murder of Keith Stephens.

Stephens and Palmer were friends. Sometime around the beginning of 2006, Stephens agreed to sell Palmer a car. Palmer took possession of the car, but he failed to pay for it, and on the evening of February 19, 2006, Stephens went to Berkeley to get it back. In a call to his mother around 6:15 p.m., Stephens told her the car was gone and he had heard Palmer had sold it. She urged Stephens to come home and report the car as stolen, but he "said he was going to go find his car."

About 15 minutes later, Stephens arrived at the Emeryville home of Palmer's girlfriend. Palmer's girlfriend, who was given immunity in exchange for her testimony, testified that she was leaving for her 7:00 p.m. work shift in Hayward when Stephens approached her and asked for Palmer. Stephens then used a crowbar to break the window of her van and said, " '[W]hen I see your boyfriend[,] I'm going to kill him.' " Afraid, Palmer's girlfriend immediately left in the van and headed to work. Stephens admitted that he had broken the window in calls to his sister and mother made after he left Emeryville.

Smith had known Palmer for years and had dated Palmer's sister in an on-again, off-again relationship. The prosecution's theory of the case was that Smith killed Stephens in anger over Stephens's having broken Palmer's girlfriend's window. To

answer the question why Smith would kill Stephens in retaliation for violence directed at Palmer's—not Smith's—girlfriend, the prosecution presented evidence that Smith and Palmer's girlfriend had a closer relationship than the two were willing to admit. This evidence included telephone records suggesting that Smith, using his ex-girlfriend's cell phone, had frequent conversations with Palmer's girlfriend, using her own cell phone.[3] These records showed 52 calls between these cell phones during an 11-day period in February 2006, including 21 calls between February 9 and the night of February 14, a period when Palmer was incarcerated. In particular, two calls were made on Palmer's girlfriend's phone immediately after Stephens broke the window, both to Smith's ex-girlfriend's phone: one at 6:33 p.m. that lasted one minute and 40 seconds and one at 6:37 p.m. that lasted 28 seconds. Smith's ex-girlfriend testified that she did not receive any of the February 2006 calls, including either of these two calls, and had never talked to Palmer's girlfriend that often.

In a pretrial interview with district-attorney inspectors, Palmer's girlfriend initially claimed that after Stephens broke her window, she "dialed any numbers that [she knew Palmer] called [her] from" in an attempt to reach Palmer but did not actually reach anyone. After being confronted with the telephone records showing that her phone made only the two answered calls to Smith's ex-girlfriend's phone in the relevant time period, Palmer's girlfriend changed her story and said that she made both calls to Smith's ex-girlfriend in an attempt to reach Palmer.

During the same pretrial interview, Palmer's girlfriend had also denied that she had a general practice of talking to Smith's ex-girlfriend by telephone. Referring to the other woman, Palmer's girlfriend stated, "I mean, that's [Palmer's] sister. If I see her, I see her, we don't sit there and talk on the phone or nothing like that." After seeing the telephone records, Palmer's girlfriend claimed that she did occasionally talk to Smith's

[3] During this time period, Palmer's girlfriend shared her cell phone with Palmer because he did not have his own, and Smith's ex-girlfriend shared hers with Smith because he did not have his own either. At trial, Smith's ex-girlfriend explained that she would leave her cell phone with Smith "for long periods of time" so she could contact him. She testified that she almost never spoke to her brother's girlfriend by telephone.

ex-girlfriend by phone and that it was possible she had spoken to the other woman during the February 2006 calls. Palmer's girlfriend steadfastly denied in the interview and at trial that she had ever spoken to Smith by phone or had ever had any type of relationship with him.

After leaving Emeryville, Stephens drove to his best friend's house, which was on Carrison Street between San Pablo Avenue and Mabel Street in Berkeley. Stephens arrived there shortly before 7:00 p.m. and parked in front. Derrick Adkins, a cousin of Stephens's best friend, and an elementary-school-aged boy whom Adkins was watching were the only other people at the house. Adkins, who was affiliated with Kumi 415, a prison gang, had just been released on parole and was staying with his cousin.

Adkins testified that he and Stephens talked in the living room at the front of the house while the boy stayed in a back room. Stephens, who seemed "pretty agitated," told Adkins that a man named Kamasa owed him money and that Stephens had just broken Kamasa's girlfriend's window. Adkins was several years older than his cousin and Stephens and did not hang out with their friends, so he did not know who Palmer was.

According to Adkins, a few minutes after Stephens arrived, there was "a loud chilling bang" on the front door's metal security gate, as if made by an object instead of a fist. Adkins went to the window to see what had made the noise. The porch light was on, and he saw a man holding a sawed-off shotgun on the walkway leading to the front door. Before Adkins could tell Stephens not to go outside, Stephens had exited the house. Adkins heard Stephens say, "[W]hat's up, . . . cuz?," with "a very hostile tone," leading Adkins to assume the man with the gun was Palmer. Adkins then heard a "boom" and saw Stephens fall backward. Adkins immediately dropped to the floor, from where he could hear Stephens "groaning" but did not see the gunman leave or hear any cars.

Adkins testified that two to three minutes after the shooting, he heard his girlfriend returning to the house and went outside to make sure someone called 911. Berkeley police received the report of gunshots shortly after 7:00 p.m. and arrived within minutes to find Stephens lying on the house's pathway. He had died from a direct, close-range shotgun wound to his chest. In the statement Adkins gave to police at the scene, he said,

"The only thing I could make out about the [shooter] is that he was wearing all black" and holding a shotgun.

A male witness testified that he was attending a family party that night down the block on Carrison. He was standing outside around 7:00 p.m. when he noticed "a car that was going too slow" heading down the street toward San Pablo. The car, whose headlights were off even though it was dark, then backed up the street toward Stephens's best friend's house while still facing toward San Pablo. After the car was out of sight for about a minute, the witness heard a gunshot come from the direction where the car had gone. The car then came back into view driving "very quickly towards San Pablo." The witness never saw anyone get in or out of the car, and he did not see any other cars driving on Carrison during the same timeframe.

The witness testified that he was not sure what kind of car he had seen but knew it was blue. In an earlier statement to police, he described the car as "[a] blue four door American-made vehicle." Soon after the murder, he was shown pictures of Smith's car and said it was the one he had seen.

B. Smith's Statements to Police and His Ex-girlfriend.

At the time of Stephens's murder, Smith was a confidential drug informant for a Berkeley police officer. That officer called Smith a few hours after the murder because he knew that Smith was then living with his grandmother less than a block away on Carrison from where Stephens was killed. Smith told the officer that Stephens "was like a cousin somewhat related to the family" but that he did not know anything about the murder. The parties stipulated that a day after the murder, the officer told a colleague that the confidential informant had "told him that [the informant] had information stating that [Palmer] pulled the trigger."

Four days after the murder, Smith's ex-girlfriend called 911 during a fight with Smith. According to her, the two were fighting because she was leaving him. In the course of the 911 call, a recording of which was introduced at trial, she stated, "Something about the boy that got murdered, I know somethin' about it. Yeah." She explained at trial that she said this after Smith, who was yelling in the background, told

her something like " '[B]itch, by the way, let them know what me and your brother did . . . to that boy.' " She testified that although Smith did not mention murder specifically, she knew "from the streets talking" that Stephens had been murdered and "put two and two together."

Meanwhile, the Berkeley police detective assigned to investigate Stephens's murder, Lionell Dozier, initially focused on Palmer as a suspect.[4] Detective Dozier had heard reports from Stephens's family that Stephens had been in a dispute with Palmer over the car sale and that Stephens had broken Palmer's girlfriend's window. Detective Dozier soon learned that Smith wished to speak with him. Smith had just been booked into jail because of the domestic-violence incident with his ex-girlfriend, and he was willing to talk about the murder "in exchange for some sort of consideration" on his domestic-violence case.

1. Smith's first interview.

A recording of the ensuing interview, which took place the same day as the domestic-violence incident, was played for the jury. Smith reported that on the night of the murder, he was in his car when Palmer's girlfriend, with whom he claimed to talk "every[]day," called Smith on his ex-girlfriend's cell phone. Palmer's girlfriend told Smith that Stephens had broken her window. She asked Smith to follow her to the freeway so she could go to work, but he refused and told her to report the incident.

Palmer's girlfriend soon called Smith back and said she had called the police.[5] She was crying, and she indicated she was upset because she had thought Stephens was going to hit her with the crowbar he used to break the window. Smith said he then agreed to help her, met her near her house, and followed her to the freeway entrance. After that,

[4] We will refer to Dozier as Detective Dozier, although we recognize that his title had changed by the time of trial.

[5] The evidence showed that Palmer's girlfriend called the Berkeley police about 15 minutes after Stephens broke her window and soon afterward reported the incident in person at the Emeryville Police Department.

he headed to his grandmother's house on Carrison to get a car seat so that he could pick up his ex-girlfriend's baby from the baby's grandmother.

After getting the car seat, Smith left his grandmother's house. As he paused at the stop sign at Carrison and Mabel, "playing [his] music for a second," a "baby blue" car pulled up behind him and parked. He heard a sound like "dun, dun, dun" and looked over to see a "heavy set dude" who was "way bigger" than he was knocking on the door of a house. Smith described the man as "about five-six, five-seven, muscular build, . . . [and] anywhere from 180 to 200" pounds. The man was wearing blue jeans and a black hooded sweatshirt with the hood up and had on a pair of Nike Air Jordan sneakers that Smith recognized because he had "the same exact ones."

Smith said he saw Stephens, whom Smith claimed to have just found out was his cousin, come outside and begin talking to the heavyset man. Smith told Detective Dozier that he and Stephens had recently had a disagreement over another vehicle but were "still cool" and hung out together. According to Stephens's mother, however, there was "bad blood" between her son and Smith based on that incident.

Smith said he began driving again, and when he was 30 to 40 feet away from the stop sign, he heard a gunshot. He looked in his rearview mirror and saw the heavyset man run diagonally across the street, carrying a "big ass long ass gun," which Smith later repeatedly referred to as a "shotgun."[6] The man got into the passenger's side of the light blue car. Smith then sped away because he "was nervous," as "everybody kn[e]w what kinda car [he drove]" and he was afraid the shooter would target him to "tie up [the shooter's] loose ends." He soon realized that he had forgotten to get his ex-girlfriend's baby, and after he did so, he went to his ex-girlfriend's house and stayed there for the rest of the evening.

Smith claimed that around midnight, Palmer called him to ask for a ride to Palmer's girlfriend's house. Smith refused. The two men spoke again the next day, after

[6] Detective Dozier testified that when a homicide occurs in Berkeley, the police do not release to the media any information about a potential murder weapon. Smith claimed he knew it was a shotgun "[b]ecause the streets talk."

Palmer found out that he was suspected of murdering Stephens. Palmer denied killing Stephens, but Smith said he told Palmer that the theory that he (Palmer) was the killer made sense because Stephens had been killed right after breaking Palmer's girlfriend's window.

Smith stopped just short of identifying Palmer as the shooter, saying that he had not seen the man's face but that the man "fit [Palmer's] shape." Addressing Detective Dozier, Smith said, "To be honest with you[,] I'm kinda sure it was [Palmer]. I think it was him that did that shit. I mean because if it was my broad, and somebody did it to my broad, I would react the same way. . . . I would be upset, I would try to do whatever." Smith later said, "I know it was [Palmer]. I know it was because I know [Palmer's] deal. I know his run. I know everything about [Palmer]. I grew up with [Palmer]. I've known his sister for seven years." Palmer was "evil" when he got mad, and Smith had "seen him hit people with bats[,] . . . pull guns on people and damn near use them." Smith suggested that the police look for Palmer in Hayward, where Palmer's girlfriend's family had a house, because that was where Palmer normally went to hide out. In conjunction with this suggestion, Smith offered the opinion that Palmer's girlfriend "would do anything to protect" Palmer: "Hell yeah, she would. She wear that boy's dirty drawers. She love him to death. She would do anything in her power to help him."

Smith posted bail soon after this interview and was released, but he was rearrested in mid-March 2006 for a parole violation based on the same domestic-violence incident with his ex-girlfriend. The domestic-violence charges were dropped in April 2006 after Smith's ex-girlfriend told his parole officer that Smith had not done anything. At trial, Smith's ex-girlfriend testified that she had lied because she was afraid that Smith would attack her when he got out of jail if she told the truth.[7]

[7] Smith's ex-girlfriend also indicated that she was reluctant to testify at trial because she was afraid of Smith and worried that something bad would happen to her as a result of her testimony. Smith sent her a letter from Santa Rita Jail in December 2010 in which he threatened that if she did " 'anything where [his] life [was] concerned,' " it could " 'get real ugly real fast.' " A few weeks before testifying, she received another letter in which

2. Smith's second interview.

Over the next two years, the Berkeley police made little progress in investigating Stephens's murder. In April 2008, a homicide detective newly assigned to lead the investigation re-interviewed Smith, who was then in prison for robbery. Palmer was still the primary suspect, but the detective suspected Smith had also been involved. Smith's statements were for the most part consistent with what he had said in the earlier interview with Detective Dozier. Smith again admitted that he was on Carrison when the murder occurred, and he swore that no one had gotten into his car despite what any witnesses might have said.

Smith also implicated Palmer again, saying that he had not seen the shooter's face but was "pretty much 100% positive" the man was Palmer. But Smith said he could not testify against Palmer because if he did so, he "would be dead so mother[]fucking fast." Smith agreed there was cause to suspect him, because he was close to Palmer and "known for playing with guns." But Smith claimed he had never owned or shot a shotgun before and was "scared of them big ass guns."

There was one major inconsistency in the second interview: Smith initially said that during the murder he was on his way to drop off his ex-girlfriend's baby, not pick her up, and that he took her directly to her grandmother's house after driving away from the scene. He said that when he heard the gunshot, he sped off because he had the baby in the car and was on parole. Later in the interview, however, he returned to the story that he had been on his way to pick up the baby when he heard gunshots. Indeed, he claimed that he had arrived at the baby's grandmother's house "not even two minutes" after the shooting and that this visit was his "alibi." After interviewing Smith, the detective concluded there still was not enough evidence to charge either Smith or Palmer with Stephens's murder.

Smith asked her to testify to several points, including that she had asked him to pick up her baby and he had to go to his grandmother's house to get the car seat.

C. Adkins's Identification of Smith as the Shooter.

In March 2009, Adkins reported to the police that he had in fact seen the face of the man who shot Stephens. At trial, Adkins testified that he had originally lied to police about being unable to identify the shooter because he was on parole at the time and was afraid that if he was sent back to prison, he would be "labeled a snitch" and face violent repercussions from his gang. He explained that he chose to come forward at the time he did because he was about to be discharged from parole, which his parole officer corroborated.

After Adkins came forward, the police showed him two photographic lineups, the first with Palmer's picture in it and the second with Smith's picture in it. Adkins looked at the first lineup and could not identify Palmer, but in the second lineup he identified Smith as the shooter. Adkins also told the police the shooter was between six feet and six feet, two inches tall.[8]

Adkins told the police that he did not know Smith but had seen his face before. At trial, Adkins explained that he had previously seen Smith at Santa Rita when they were both incarcerated there, an overlap confirmed by jail records. Adkins also recalled seeing Smith about a month before the murder when the two men ran into each other near Adkins's cousin's house. In response to Smith's questions, Adkins told Smith that he was staying at his cousin's house and pointed toward the house.

Adkins testified that a month or two after identifying Smith in the lineup, he was threatened at his workplace. A co-worker who knew both Adkins's cousin and Smith said, " 'They gonna get you.' " As a result of this incident, Adkins quit his job and moved out of the state. While he was back in the Bay Area to testify at Smith's preliminary hearing in 2010, he learned that members of Kumi 415, which is based in the

[8] The parties stipulated that Smith is six feet, one inch tall. Detective Dozier testified that Palmer is "shorter" and more "muscular" than Smith.

Bay Area, had approached his best friend in the new state.[9] The district attorney's office then assisted Adkins in relocating to a third state.

After Adkins expressed reluctance to be a witness at trial because he feared retaliation, he was held at Santa Rita in accordance with section 1332, which permits material witnesses to be held in custody until they testify. (§ 1332, subd. (b).) Adkins testified that while at Santa Rita waiting to testify, an inmate approached him and said, " 'I need to holler at you about [Smith],' " which Adkins took as a threat. On the morning that Adkins was transported to court for the trial, he passed Smith, who told him, " '[D]on't do it.' "

In addition to the identification itself, the defense's cross-examination of Adkins focused on two issues. First, a $15,000 reward had been offered for information leading to the conviction of Stephens's killer, which Adkins learned about a few months after he had identified Smith in the photographic lineup. Adkins acknowledged that the reward money was one of the reasons he was testifying but explained that it was not enough to make up for the ensuing disruption of his life: "I been forced away from my family. I can never come and walk the streets of northern California again without having to worry about somebody doing something to me. So I feel if there is something[,] I do deserve it." Second, Adkins admitted to having a diagnosis of paranoid schizophrenia, a condition he had been hospitalized for and took medication to treat. He denied experiencing any hallucinations or other perception difficulties at the time of the murder, however, as his schizophrenia was then controlled by medication.

D. Smith's Jailhouse Conversations.

Although Smith was not a suspect in the murder after his February 2006 police interview, at Detective Dozier's request recordings of telephone calls Smith placed from Santa Rita in March and April 2006 were retained.[10] Similarly, at the request of the

[9] Adkins's testimony about this incident was admitted to demonstrate his state of mind and not for the truth of the matter asserted.

[10] Employees of the Alameda County Sheriff's Department testified that all telephone calls placed by inmates from Santa Rita and all visits with inmates are recorded and kept

district attorney's office, recordings of Smith's telephone calls and visits at Santa Rita from October 2011 to March 2012, the month before the trial began, were also retained. Many of these jailhouse recordings, amounting to over 300 pages of transcripts, were admitted and played at trial. As do the parties, we will refer to the admitted conversations as Exhibit 20, although we recognize that the exhibit also contained the transcripts of Smith's police interviews.

The prosecutor explained that she divided Exhibit 20 into four categories: conversations in which Smith tried to arrange for others to hide or get rid of the car he had been driving the night of Stephens's murder; conversations in which Smith made "what [the prosecutor] would term direct admissions" about the murder; conversations relevant to Smith's attempts to intimidate witnesses; and conversations with M.A., the girlfriend of Smith's cellmate in 2012, offered to demonstrate that Smith's motive for the murder was to retaliate against Stephens for his actions against Palmer's girlfriend. Rightly or wrongly, these recordings played an outsized role at trial, and we discuss their content further below as necessary to resolve this appeal.

II.
DISCUSSION

A. The Trial Court Properly Denied Smith's Motion for a New Trial Based on Ineffective Assistance of Counsel.

Smith contends that his trial counsel provided ineffective assistance by failing to investigate or present evidence that the clothes Palmer claimed he wore the day of the murder tested positive for GSR and that Palmer's alibi had disappeared, both of which would have supported the defense theory that Palmer was the shooter. We are not persuaded.

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for 90 days. At an outside agency's request, recorded calls and visits may be searched and saved.

1. Additional facts.

a. The GSR evidence.

One of the prosecution's motions in limine sought "to exclude evidence of one particle of [GSR] found on a T-Shirt belonging to . . . Palmer . . . unless the defense calls the expert analyst who performed the GSR test."[11] Smith's trial counsel stated he was "willing to stipulate to what the results of [the GSR test] were" and wished to introduce the laboratory report containing the results without any accompanying expert testimony for the nonhearsay purpose of explaining Detective Dozier's investigation. The prosecutor refused, arguing that one particle of GSR was "insignificant" and that without expert testimony to make that clear, the jury would be left to speculate about the evidence's significance. After Smith's counsel indicated he would be willing to present an expert "[i]f the [c]ourt would consider funding that endeavor," the trial court responded that if Smith requested funding, it "would be inclined to pay for testimony only on one day." The court then ruled that counsel would not be permitted to question Detective Dozier about the GSR test's role in the investigation without presenting expert testimony on GSR first.

At trial, Detective Dozier testified on cross-examination that four days after the murder, he had obtained the clothing Palmer said he had been wearing on the day of the murder, and the detective agreed that he had "take[n] it some place where it could be tested." Smith's trial counsel did not question the detective, however, about whether any test was actually conducted or about the results of any such test. Instead, counsel elicited the testimony that Palmer became angry after some of his clothing was not returned and threatened to kill the detective. Neither the laboratory report including the GSR test results nor any expert testimony about GSR was introduced.

Although the GSR sample had actually been tested, in his closing statement Smith's trial counsel told the jury members to ask themselves why the sample had *not*

[11] The prosecutor later clarified that the sample consisted of one GSR particle and one partial particle that was "less indicative of [GSR]."

been tested. In rebuttal, the prosecutor indirectly agreed that the sample had not been tested and suggested the omission was a police oversight.

b. The undermined alibi.

Another of the prosecution's motions in limine sought to exclude statements by J.C., Palmer's godmother, unless she was called as a witness at trial. According to the prosecutor, in a February 2006 interview with police, J.C. had claimed that Palmer came to her house around 6:00 p.m. the night of the murder, that she left him with children who were in her care, and that he was still there when she returned around 8:00 p.m. Two years later, however, she was unsure about when Palmer had arrived at the house and indicated that "she would not have let [him] watch the kids for two hours." Thus, Palmer's alibi had "in essence . . . implode[d]." Smith's trial counsel indicated that he might elicit the fact that Detective Dozier had questioned J.C. but would call her as a rebuttal witness to introduce her statements only if he "thought it was necessary." Ultimately, Smith's counsel did not ask the detective about J.C., and she did not testify.

c. Smith's motion for a new trial.

After the verdict, Smith retained a different attorney to bring a motion for a new trial on the basis of ineffective assistance of counsel. In the motion, Smith claimed that given his defense that Palmer killed Stephens, his trial counsel could have had "[n]o valid tactical reason" for failing to present evidence that GSR was detected on Palmer's clothing and that Palmer's alibi had disappeared. Smith argued that the errors were prejudicial because most of the evidence against him was that he was "a bad, untrustworthy person . . . [and] a manipulative jail caller," was "very close to the scene . . . at the time of the murder," and had "[taken] measures into his own hands to attempt to manipulate the trial result," as opposed to any evidence directly suggesting he was the shooter.

In response, the prosecution argued that Smith's trial counsel's failure to present either the GSR evidence or J.C.'s testimony was "supportable as a sound trial tactic" because Smith and Palmer "were tightly aligned, [so] defense counsel had to make sure that any guilt imputed to [Palmer] would not reflect back on [Smith]." In addition, the

GSR evidence was "weak" because only a small amount was collected several days after the shooting, and introducing J.C.'s testimony "would have been risky," including because J.C. was subject to impeachment based on her prior convictions. The prosecution also argued that any errors were harmless because the evidence against Smith was strong.

In his reply brief, Smith asked the trial court "to focus its inquiry on the absence of any meaningful investigation into the available defense evidence . . . that reasonable doubt existed as to whether [he] killed Stephens . . . and used a firearm in the murder." In a declaration submitted with the reply brief, Smith's trial counsel averred that before trial he became aware that GSR had been detected on Palmer's clothes but "did not contact [the laboratory] to discuss the report with the analyst[,] . . . did not contact any other experts or make any attempts to secure [c]ourt funding of any expert testimony regarding [GSR, and] . . . did not subpoena the analyst or any of the witnesses to lay the chain of custody for the clothing that displayed [GSR]." Counsel also stated that he was aware that J.C. had withdrawn Palmer's alibi but that he "did not make any efforts to contact [J.C.] during the time [he] represented . . . Smith."

Although it recognized that Smith's trial counsel "was walking a fine line trying to sort of preserve . . . Palmer as an alternative source for being responsible for this murder without letting it slide into it becoming that . . . Palmer and . . . Smith did this together," the trial court ultimately ruled that there was "not a good tactical reason for not taking any further steps on the GSR." The court also found that there was no good reason not to have contacted J.C. Thus, the court held that counsel's performance had been deficient.

The trial court denied the motion for a new trial, however, because it ruled that Smith had failed to establish prejudice. The court concluded that neither the GSR evidence nor J.C.'s testimony would have had much probative value. First, there were many different scenarios under which one particle of GSR could have ended up on clothing Palmer was wearing that was not collected until four days after the murder. Moreover, it was "possible that [Smith's trial counsel] got more mileage" from arguing, incorrectly, that the GSR sample was never tested than he would have gotten from

presenting the GSR test results. Second, the evidence J.C. would have provided was weak, as it was not clear to the court that she "had actually taken back the alibi" as opposed to merely saying that she was having trouble remembering but thought she would not have left the children with Palmer for very long.

The trial court also reviewed the "enormously strong" evidence against Smith, including the jailhouse recordings, his admission to being at the murder scene, and his ex-girlfriend's indication during the 911 call that he had told her about the murder. In particular, the court found that Adkins "was a very persuasive witness" and that Smith's ex-girlfriend was "a completely devastating witness to . . . Smith. . . . [¶] . . . She buried him." Thus, the court determined that even if evidence about the GSR had been introduced and J.C. had testified, there was not a reasonable probability that the verdict would have been different, as to either the murder charge or the firearm enhancement.

2. Smith failed to show the requisite prejudice.

The federal and state Constitutions guarantee criminal defendants the right to adequate representation by counsel. (U.S. Const., 6th Amend.; Cal. Const, art. I, § 15; *People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).) To prevail on a claim of ineffective assistance of counsel, a defendant must show by a preponderance of the evidence both "that counsel's performance was deficient," such that "counsel was not functioning as the 'counsel' [constitutionally] guaranteed," and "that the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Centeno* (2014) 60 Cal.4th 659, 674.)

To establish the first *Strickland* prong, a defendant must show that "counsel's performance . . . fell below an objective standard of reasonableness under prevailing professional norms." (*Mai, supra,* 57 Cal.4th at p. 1009.) In assessing this prong, a court "defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*Ibid.*) Because this presumption typically can be rebutted only with evidence outside the record, ineffective-assistance claims are generally raised in habeas corpus proceedings. (*People v. Carrasco* (2014) 59 Cal.4th 924, 980; see *Mai*, at p. 1009.) Such claims may also be raised in a

motion for a new trial, however (*People v. Fosselman* (1983) 33 Cal.3d 572, 582), and are appropriately considered in that procedural posture " 'when the court's own observation of the trial would supply a basis for the court to act expeditiously on the motion. . . . "It is undeniable that trial judges are particularly well suited to observe courtroom performance and to rule on the adequacy of counsel in criminal cases tried before them. . . . If the court is able to determine the effectiveness issue on such motion, it should do so." ' " (*Carrasco*, at p. 981, italics omitted.)

To establish the second *Strickland* prong, a defendant must demonstrate "resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*Mai*, *supra*, 57 Cal.4th at p. 1009.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.) "A defendant must prove prejudice that is a ' "demonstrable reality," not simply speculation.' " (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) Here, where Smith's claim is premised on a failure to investigate, the existence of prejudice depends on both the strength of the evidence his trial counsel could have developed with a reasonable investigation and the strength of the prosecution's case. (See *In re Thomas* (2006) 37 Cal.4th 1249, 1265.)

When a defendant raises an ineffective-assistance claim in a motion for a new trial and the motion is denied, we review de novo the trial court's rulings on whether trial counsel's performance was deficient and whether any deficiency was prejudicial. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1261-1262; *People v. Albarran* (2007) 149 Cal.App.4th 214, 224, fn. 7; *People v. Taylor* (1984) 162 Cal.App.3d 720, 724; cf. *People v. Callahan* (2004) 124 Cal.App.4th 198, 209-211.) "We accept the . . . court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

The parties dispute whether the trial court correctly determined that the first *Strickland* prong, deficient performance, was met. We need not decide this issue with respect to either the GSR evidence or J.C.'s testimony, however, because Smith has failed to demonstrate the requisite prejudice. (See *Strickland*, *supra*, 466 U.S. at p. 697

[better course is to avoid determining whether counsel's performance was deficient "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice"].) In reaching this conclusion, we assume that prejudice would be established if the evidence Smith's trial counsel failed to develop would have sufficiently undermined the theory that Smith was the *shooter*, even if there was otherwise enough evidence that he was guilty of murder under another theory of liability. In this regard, we observe that the jury was not instructed on aiding and abetting or otherwise given the option of finding Smith guilty based on any other role in the murder. (See *Hardy v. Chappell* (9th Cir. 2016) 832 F.3d 1128, 1137-1139 [where prosecution's case rested exclusively on theory that defendant was "actual killer," error to find no prejudice under *Strickland* on basis of evidence supporting defendant's guilt as coconspirator or aider and abettor].) Moreover, the jury's true finding on the firearm enhancement allegation also depended on the conclusion that Smith was the shooter.

Smith argues that "there should be little dispute that the GSR . . . evidence would have directly supported defense counsel's central theory of the case that Palmer was the shooter." The problem is that Smith has made an insufficient showing of what that evidence would have been. As mentioned, it emerged in discussion of the GSR evidence below that one complete particle of GSR was found on Palmer's clothing. While Smith makes the conclusory assertion "that a positive GSR finding . . . would have impacted the verdict," both the trial court and prosecutor believed that such a small amount of GSR was insignificant and would not tend to suggest that Palmer was the shooter. In the absence of any expert testimony about this issue, we have no way of evaluating which position is correct.[12] As Smith has thus failed to establish either " 'the substance of the omitted evidence [or] its likelihood for exonerating [him]' " (*People v. Bolin* (1998) 18 Cal.4th 297, 334), he has not carried his burden of demonstrating a reasonable probability

[12] Smith cites a California Department of Justice publication in his reply brief to argue that "there must have been a substantial amount [of GSR] on [Palmer]'s clothes . . . for there still to be particles several days later," but the publication is not part of the record and we decline to consider it.

that the trial's outcome would have been different had the GSR test and supporting expert testimony been introduced.

It is similarly unclear what J.C.'s testimony would have been. Apparently, Palmer claimed he was babysitting at the time of the murder and J.C. originally corroborated that story. Although the record contains suggestions that J.C. had withdrawn the alibi, in denying Smith's motion, the trial court observed that it was unclear whether she had instead merely suggested that letting Palmer babysit would have been inconsistent with her normal practice. Without a better indication of what J.C.'s testimony would have been, it is difficult to evaluate what effect it would have had on the trial's outcome.

Even if we assume that J.C.'s testimony would have unambiguously undermined Palmer's alibi, we agree with the Attorney General that prejudice is not demonstrated because evidence that Palmer's alibi had disappeared was already before the jury. During Smith's 2008 police interview, one of the detectives stated that Palmer's alibi was "gone," and Smith's trial counsel relied on this statement in closing argument for the proposition that Palmer had no alibi for the murder. Moreover, in light of the evidence that both Palmer and Smith were involved in the murder, the fact that Palmer did not have an alibi for the murder may have suggested that he was at the scene, but it did not necessarily suggest that he was the *shooter*. Under these circumstances, there is not a reasonable probability that J.C.'s testimony would have resulted in a better outcome for Smith.

Smith also fails to demonstrate prejudice because the evidence against him was strong. Most crucially, Adkins identified Smith as the shooter, and the trial court specifically found that Adkins was credible. As we have said, we must defer to the court's credibility determinations in reviewing its denial of the motion for a new trial (see *People v. Nesler*, *supra*, 16 Cal.4th at p. 582), and we therefore cannot entertain Smith's arguments for why Adkins's identification held little weight. Even if we could otherwise discount Adkins's testimony, it was corroborated by a large amount of other evidence: Smith's admission that he was at the murder scene, another witness's testimony suggesting that Smith's car was the only one moving on the street at the time, Smith's

incriminating statements to his ex-girlfriend, and the evidence that Smith had some sort of relationship with Palmer's girlfriend and was in contact with her shortly after Stephens broke her window.

Finally, in this context we find it of little import, contrary to Smith's suggestion otherwise, that the jury deliberated for approximately nine hours and asked for readbacks of testimony. Although other decisions have identified lengthier deliberations and requests for readbacks as evidence that a case was close (see, e.g., *People v. Rucker* (1980) 26 Cal.3d 368, 391; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 251-252), such circumstances *alone* do not establish prejudice. This was a murder case involving many witnesses, evidence spanning six years, and differing accounts of the events at issue, and it is not surprising that it took time to reach a verdict.

In sum, the trial court correctly denied Smith's motion for a new trial on the basis of ineffective assistance of counsel because there is no reasonable probability that the introduction of the GSR evidence or J.C.'s testimony would have resulted in a different outcome, both because Smith made an insufficient showing either would have helped his defense and because the evidence that he was the shooter was strong.

B. The Prosecutor's Closing Rebuttal Argument Did Not Violate Smith's Right to a Fair Trial.

Smith next argues that he was denied a fair trial when the prosecutor "falsely told the jury that the state had never tested Palmer's clothes for GSR" during her closing rebuttal argument.[13] (Some capitalization omitted.) We disagree.

In his closing argument, Smith's trial counsel identified certain questions the prosecutor had not yet answered, "[t]he first one being why wasn't the [GSR] sample that was taken from . . . Palmer's clothes, which were acknowledged to be the clothes that he was wearing the night that . . . Stephens was shot, why wasn't that [GSR] sample tested?" Counsel continued, "Wouldn't you have liked to have known whether . . . Palmer had

[13] Although Smith contends that his trial counsel also made false statements about the GSR evidence in closing, Smith's claim ultimately hinges on whether prosecutorial misconduct occurred, as he appears to accept. We therefore confine our analysis to the prosecutor's statements.

[GSR] on his clothing? The prosecutor is going to tell you that the defense has the ability to also get that particular sample tested to determine whether there's [GSR], and that's true. But the defense does not carry the burden in this case, the prosecution carries the burden. And her burden is to prove to you beyond a reasonable doubt that . . . Smith was the shooter. And if . . . Palmer has [GSR] on his shirt, then that impacts that decision. She won't be able to answer that question for you."

In rebuttal, the prosecutor responded as follows: "The defense asked me to answer some questions for you, and I want to turn to those questions now. One of the questions was why wasn't [GSR] tested on [Palmer's] shirt. . . . [¶] This was not the Berkeley [P]olice [D]epartment's finest hour. They had a suspect, they focused in on that suspect to the exclusion of looking at the broader picture and looking at the rest of the evidence. Through a series of transfers and other things, this case kind of jumped from person to person to person, and I can't speak for them or on their behalf. No one ever took that case and ran with it and did the thorough investigation that needed to be done."

A prosecutor's "improper comments" violate the federal Constitution if they " ' "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." ' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000.) If a prosecutor's conduct does not violate the federal Constitution, it violates " ' "state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' " (*Ibid.*) In a claim involving comments made before the jury, " 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*Id.* at p. 1001.)

The parties disagree about whether Smith forfeited this claim by failing to object below to the prosecutor's comments, a dispute we need not resolve because the claim fails on the merits. In particular, we do not accept Smith's premise that the prosecutor's statements during rebuttal were false and therefore constituted misconduct. Detective Dozier testified that he collected Palmer's shirt and agreed that he took it to "some place where it could be tested," but neither the fact that the GSR sample was analyzed nor the results of the test were introduced into evidence. Certainly, a fair interpretation of the

prosecutor's statements was that the sample was not tested, but such a suggestion was consistent with the state of the evidence. Indeed, had the prosecutor "corrected defense counsel's obvious misstatement" by stating that the sample was tested, as Smith contends she should have, *that* would have constituted misconduct. A prosecutor's reference "to facts not in evidence . . . is 'clearly misconduct' [citation], because such statements 'tend[] to make the prosecutor his [or her] own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." ' " (*People v. Hill* (1998) 17 Cal.4th 800, 827-828.) The prosecutor was limited to arguing the facts in evidence, and her indirect suggestion that the sample was not tested did not constitute misconduct.

Even if the prosecutor's statements in rebuttal had improperly misled the jury, we would reject Smith's claim because the statements were not prejudicial. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1001.) The impression that the police had failed to test the GSR sample did not harm the defense because it preserved the possibility that the results would have implicated Palmer. If the prosecutor had instead indicated that the sample *was* tested, the jury would have been left wondering why the defense did not introduce the results and would have likely concluded that the reason was because the results did not implicate Palmer. Moreover, as we have previously explained, there was strong evidence of Smith's guilt, including Adkins's identification and Smith's admissions. We therefore conclude that it is not reasonably probable that Smith would have obtained a more favorable result had the prosecutor not suggested that the GSR sample was never tested (see *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)) and any misconduct was harmless beyond a reasonable doubt (see *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)). (See *People v. Booker* (2011) 51 Cal.4th 141, 186.)

C. Smith's Challenges to the Admission of Various Jailhouse Recordings Do Not Entitle Him to Relief.

Smith contends that the trial court erred by admitting recordings of jailhouse conversations he had with three women—T.B., M.B., and M.A., the girlfriend of Smith's cellmate—because this evidence was offered solely to prove that he had a propensity to interfere in others' romantic relationships and had therefore done the same by interfering in the relationship between Palmer and Palmer's girlfriend. Smith also claims that, contrary to the court's ruling, the M.A. conversations were not admissible as evidence of motive or a common plan or scheme to commit violence on behalf of women with whom he was romantically involved. Finally, he claims that major portions of the conversations with T.B. and M.A., as well as one conversation with his ex-girlfriend and one conversation with a male friend, should have been excluded as unduly prejudicial under Evidence Code section 352 (section 352) and that their admission violated federal due process. Smith is not entitled to relief on any of these claims because most of this evidence was not improperly admitted and none of it was sufficiently prejudicial.

1. Applicable legal standards.

To be admissible, evidence must be relevant. (Evid. Code, § 350.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id.*, § 210.) Evidence of a person's character is inadmissible to prove a person's "conduct on a specified occasion," however, unless it involves the commission of "a crime, civil wrong, or other act when relevant to prove some fact . . . other than [the person's] disposition to commit such an act." (*Id.*, § 1101, subds. (a) & (b).) Even if evidence is relevant and otherwise admissible, a trial court may exclude it "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Id.*, § 352.) Finally, regardless of whether the admission of evidence violated

state evidentiary law, a federal due process violation lies only if the evidence resulted in a "fundamentally unfair" trial. (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 229.)

We review the trial court's evidentiary rulings for an abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 552, 597.) Under this standard, we disturb those rulings only if the trial court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

2. The two 2006 calls with T.B.

As previously mentioned, before trial the prosecution moved to introduce a large number of recordings of Smith's Santa Rita calls and visits in 2006 and 2011-2012. Among these were two 2006 calls with a woman, T.B., which were offered on the basis that they contained Smith's "admissions directly relating to the murder."

T.B. was a cousin of a woman with whom Smith was involved while he was still in a relationship with his ex-girlfriend. In a March 2006 call with T.B., the following exchange occurred:

[SMITH]: [Y]ou know what they chargin' me with, right?

[T.B.]: Uh-uh, what?

[SMITH]: Take a wild guess.

[T.B.]: I think you told me already.

[SMITH]: A hot one?

[T.B.]: Yeah, dude?

[SMITH]: Yeah.

[T.B.]: Ooh they really is?

[SMITH]: Yeah.

[T.B.]: They gonna (unintelligible)?

[SMITH]: Yeah you thought I was bullshittin'?

[T.B.]: Well but you didn't.

[SMITH]: Man regardless of whether I did or didn't, they ain't got enough evidence, I guess, whatever or whatnot sayin' that I did.

[T.B.]: How they got evidence that you did it?

[SMITH]: I can't talk to you on this phone, but now I can write you and tell you everything.

Smith objected that the purported admission in this call was not a statement against interest and that the evidence was irrelevant. The trial court overruled the objection, stating, "I find this to be very close to an admission. It's a clear opportunity to deny involvement in a murder and instead when the other person in the phone call says, 'Well, but you didn't do it.' [¶] 'Regardless of whether I did or didn't, they ain't got enough evidence saying that I did.' [¶] That is highly relevant, extraordinarily relevant and material, and highly probative referencing . . . Smith's state of mind at the time. I find that there's [no] undue prejudice here and . . . [no] issues related to undue consumption of time and confusing of the issues."

The other challenged call with T.B. occurred in April 2006. At the beginning of the call, Smith told T.B. he had been offered a 19-year sentence but was going to go to trial because "they tryin' to put a nigga at the scene of the crime when a nigga wasn't even there." After Smith asked T.B. to tell her cousin to write to him, the conversation continued as follows:

[SMITH]: It's lookin' ugly for me man. I need a pen pal or somethin' man. We ain't got to be together or nothin'. It ain't like I'm comin' home - and tell her how long I got too. Tell her how - what they offerin' me.

[T.B.]: I'm a tell her.

[SMITH]: 'Cause like man they give - tryin' to get that boy all day.

[T.B.]: It's fucked up cuz.

[SMITH]: Sh- it ain't fucked up - it's - know what I mean? Niggas be out of line. Niggas be in the way. Niggas got to get removed.

[T.B.]: But niggas need to stop lyin'. That's scandalous.

[SMITH]: See but the thing is though right . . .

[T.B.]: Uh-huh.

[SMITH]: They not.

Smith objected that the call was unduly prejudicial under section 352 and that the statement " '[t]hey not' [was] too vague" to be meaningful as an admission that he was involved in Stephens's murder. During their discussion of the motions in limine, the parties and the trial court appeared to agree that the portions of the call involving the murder were admissible and primarily discussed how to address a large amount of other, sexually explicit conversation during the call, some of which involved whether Smith had had three-way sex with his ex-girlfriend and T.B.'s cousin. After Smith's trial counsel agreed to the court's proposed redactions to remove the "inflammatory sexual references," the court ruled that the balance of the call was admissible.

Smith's first claim involving the T.B. calls is that they were inadmissible character evidence. Smith did not raise such an objection to these calls below. Moreover, the trial court never addressed whether they were admissible under Evidence Code section 1101, subdivision (b) (section 1101(b)) to prove a fact other than propensity. Instead, the discussion of section 1101(b) as it bore on Smith's relationships with women was confined to the conversations with M.A., and it occurred after the T.B. calls were admitted. As a result, we conclude that Smith forfeited this challenge. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-434 (*Partida*) [claim that evidence erroneously admitted not cognizable unless " 'timely and specific objection' " made on same ground error is asserted on appeal].)

Even if Smith had not forfeited this claim, it would fail. His only explanation of why the T.B. calls were inadmissible character evidence is that they, like the conversations with M.B. and M.A., were offered to show that he "had interjected himself into other people's relationships . . . to prove that he . . . did the same thing with [Palmer's girlfriend]." To the extent the T.B. calls were relevant on the issue of Smith's pattern of relationships with women, however, it was because they showed his attempts to foster a relationship with T.B.'s cousin, not T.B. herself. And there was no suggestion

that the cousin was in another relationship. These calls therefore do not demonstrate any "propensity to interlope" as Smith claims. (Some capitalization omitted.)

Smith also argues that both T.B. calls "contain[ed] completely irrelevant—but immensely prejudicial—extraneous information" that should have been excluded under section 352 and whose admission denied him a fair trial under the federal Constitution. We disagree.

Smith contends that aside from the exchange alluding to whether there was evidence that he committed the murder, the remaining 11 pages of the transcript of the first call are irrelevant and should have been redacted. In particular, he complains about portions of the call in which he is "flirting with a pregnant [T.B.]" and the two "discuss a tax fraud scheme." Although we agree that there was a fair amount of irrelevant information in this call that could have been removed, we cannot say that the trial court abused its discretion in not redacting it. Neither example that Smith provides was unduly prejudicial. As we explained above, the calls demonstrate that Smith was primarily attempting to foster a relationship with T.B.'s cousin, not flirt with T.B. As to the "tax fraud scheme" Smith and T.B. discussed, it was purportedly run by Smith's mother's "tax agent." Smith told T.B. to approach his mother if T.B. was interested in participating, but there is no indication he had an active role in the scheme himself. There was no error of either state or federal dimension.

As to the second call, Smith claims that other than the supposed admissions relating to the murder, the balance of the call contained "highly inflammatory extraneous information." Again, although we agree that much of the information in this call was irrelevant and could have been redacted, there was no abuse of discretion under section 352 and no violation of Smith's federal due process rights. First, Smith identifies an instance when an older relative of his got on the telephone and asked to borrow Smith's "thing," to which Smith agreed. Assuming that the older man was referring to a gun, as Smith claims, this exchange was of minimal prejudicial effect given Smith's admission in the April 2008 police interview that he was "known for playing with guns."

T.B. then told Smith that her cousin's mother had gotten in a fight, which Smith said he was glad about, and the older relative told Smith to remember that he was "from a long line of pimps," which Smith agreed was the case. These misogynistic exchanges do not reflect well on Smith, but they were minimally prejudicial in comparison to the other evidence of Smith's actions involving women, including the domestic-violence incident with his ex-girlfriend.

Finally, Smith takes issue with the trial court's redaction of explicit sexual discussions with T.B. in the second call, apparently claiming that the insertion of the placeholder "**[GRAPHIC SEXUAL DISCUSSION REDACTED]**" was itself irrelevant and prejudicial. Smith's trial counsel agreed to these redactions, however, and Smith has therefore forfeited this argument. Even if counsel had not, we would disagree that the redactions were unduly prejudicial or rendered the trial fundamentally unfair. A placeholder was necessary to explain the gaps in the conversation, and there was nothing misleading about the way the call was redacted or the description used as the placeholder. Smith has not demonstrated error in the admission of either call with T.B.

3. The May 2006 call with M.B.

In a May 2006 call with M.B., another female acquaintance, Smith asked her, "So when can I steal you?" M.B. indicated that Smith could come to her graduation dinner the following month and that she could introduce him to her mother. Smith responded, "[E]verybody momma like me though. 'Cause I'm a r- respectable person. I know how to act in front of mommas." M.B. stated that "most people . . . know how to act in front of moms. But when they leave, it's a whole different story." Smith replied, "Once I'm by myself, I - I'm a different person. . . . [¶] . . . Once I'm by myself or in the street. I t- turn to that street mentality person." Later in the call, Smith confirmed that M.B. was in a relationship and again stated that he was going to "steal" her.

Smith objected that this call and two others with M.B. that the prosecutor sought to introduce were irrelevant. In arguing for the calls' admission, the prosecutor explained, "There are three telephone calls from the 2006 series in which [Smith] is talking to a young lady named [M.B.] talking about, 'When can I steal you? Do you still

have a boyfriend,' blah, blah, blah. While they're not as overt or as -- there's nothing threatening in them as [there is in] the calls to [M.A.] in 2012. There is still some relevance particularly if the defense argues that the telephone calls in 2012 to [M.A.] have no bearing whatsoever [on] what [Smith] was thinking or feeling back in 2006 . . . . This is the real reason I'm offering those three calls. [¶] . . . There was this reaching out to other females while in custody and no problem with talking to females who had boyfriends and were in relationships at the time."

The trial court indicated that it was "not completely with [the prosecutor] on the relevance" of the calls as they related to Smith's relationship with M.A. and in turn Palmer's girlfriend. It found that the call at issue was "highly relevant [to] . . . Smith's denials of any involvement here," however, explaining, "I'm really referring in particular to the passage . . . where he describes that when he's on the streets he turns into a different kind of person. He indicates he knows how to behave in front of a girlfriend's momma. But when he's out on the street by himself, he turns into a[n] entirely different person." The court therefore admitted the call at issue and excluded the other two M.B. calls.

As he did in relation to the T.B. calls, Smith claims that the M.B. call was inadmissible character evidence. Again, however, Smith did not object on this ground below, and the trial court never addressed whether the call constituted character evidence or could be admitted under section 1101(b). He has therefore forfeited this claim. (See *Partida, supra*, 37 Cal.4th at pp. 433-434.) Even if we were to consider the claim on the merits, we would reject it. Smith fails to explain why the court's stated reason for admitting the call was insufficient. Nor does he argue that some or all of the call should have been excluded under section 352 or that its admission violated his federal due process rights. As a result, he fails to convince us that the court erred by admitting this call.

4. The 2012 calls and visits with M.A.

The prosecution sought to introduce recordings of two February 2012 jailhouse visits and several February and March 2012 telephone calls with M.A. to demonstrate

that Smith had a motive to murder Stephens.[14] The prosecutor argued that the recordings were admissible under section 1101(b) as evidence of a common plan or scheme, and Smith's trial counsel did not argue otherwise but did object under section 352.

The trial court agreed with the prosecutor that the recordings were admissible under section 1101(b) as evidence of a common plan or scheme. It explained that the recordings contained Smith's "offers to assault people on behalf of [M.A.]," establishing a pattern when viewed with the murder of Stephens after he bothered Palmer's girlfriend. The court also found that "the common features" of the two instances indicated a plan as opposed to "a series of similar spontaneous things" and indicated that the evidence might be relevant on the issue of motive as well. Finally, the court found that the evidence was not unduly prejudicial under section 352. Subsequently, the jury was instructed under a modified version of CALCRIM No. 375 that it could consider the "evidence of other behavior by the defendant, which was not charged in this case, that the defendant made threats of physical violence to anyone who would act offensively to a woman about whom he cares" solely for the purpose of determining whether Smith had a motive or plan or scheme to commit the murder.

There were four threats to harm others on M.A.'s behalf in the over 100 pages of transcripts of Smith's conversations with and about M.A. that were admitted. The first such threat occurred during a February 2012 jail visit. After Smith suggested that his cellmate was hesitant to commit to M.A. based on the worry that she might cheat, the following exchange occurred:

> [SMITH]: . . . Even though I'm in jail I have a very long arm, right?
>
> [M.A.]: Mm-hm.
>
> [SMITH]: And I don't want to have to have nobody come way to where ya'll at - right - to beat the fuck out of somebody or . . .
>
> [M.A.]: Mm-hm.

[14] Although conversations with other people that bore on Smith's relationship with M.A. were admitted, Smith limits his claim to conversations with her. In addition, we do not address a March 2012 jail visit with M.A. because it was admitted on the issue of witness intimidation and Smith does not mention it in his argument.

[SMITH]: . . . somebody over something small because one of these niggas is fondling your pussy.

The second threat occurred after M.A. complained during the same visit that a particular man was harassing her. Smith responded, "[T]ell him your brother, you'll sic this nigga on him. [¶] . . . [¶] I got plenty of . . . niggas in Berkeley that would love to come." Smith identified two other men and said, "They my niggas. Believe me. He don't want me to have them rock up on him."

Smith made the other two threats in a March 2012 call. Smith's cellmate had recently broken up with M.A., and Smith was consoling her by telling her he loved her and would do anything to make her happy. After indicating that his cellmate had revealed "a little bit about [her] past," Smith told M.A., "[D]o not ever - and let me say this again, ever degrade yourself for no nigga on this earth again." M.A. agreed, and Smith then said,

> "I will fuck one of them niggas up and I mean that from the bottom of my mother[]fuckin' heart. I will send somebody to - beat one of them nigga's heads in. . . . [¶] . . . [¶] I'm not playin'. I'm not laughin' and I got tears in my eyes right now because I don't like to see people that I care about getting fucked over. Don't ever let no mother[]fuckin' body else degrade you again. If you do, I promise you, [M.A.], you will see a side of me and you will see just how far my arm really reaches. I'm not one of them dudes that just talk. I will m- I makes it happen."

Later in the same call, M.A. mentioned that a male friend of a friend was bothering her. Smith said, "I can send little brah through that thing. Little brah gonna holla at him . . . . [¶] . . . [¶] You know what I mean? I promise you I can have little brah go knock on the nigga door and holla at him right now . . . ."

To be admissible "to prove the existence of a common design or plan[,] . . . evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) Although "the common

features must indicate the existence of a plan rather than a series of similar spontaneous acts, . . . the plan thus revealed need not be distinctive or unusual . . . . [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Id.* at p. 403.)

To be admissible on the issue of motive, the uncharged conduct need not be similar to the charged crime at all so long as there is "a nexus or direct link" between the two. (*People v. Walker* (2006) 139 Cal.App.4th 782, 804.) In this scenario, the uncharged conduct occurs before the charged crime and supplies a motive for it. (*Ibid.*; see, e.g., *People v. De La Plane* (1979) 88 Cal.App.3d 223, 245-246 [evidence of prior robberies admissible to prove defendant had motive to kill victim who planned to testify against him].) But if "the commission of the prior offense is itself not the incentive for commission of the charged crime" and the theory instead is that the defendant had " 'the same motive in both instances,' " motive becomes " 'a contributing factor in finding a common plan or design' " and the prior uncharged conduct and the charged crime "must 'share common features.' " (*Walker*, at p. 804.)

We agree with Smith that the vague promises he made to protect M.A., which come across primarily as bravado and which there is no evidence were carried out, were inadmissible as evidence of either motive or a common plan or scheme. Here, there had to be some similarity between the murder and the so-called "threats" that suggested both arose out of a common plan, because neither the threats nor Smith's relationship with M.A. more generally supplied a motive for the murder (or vice versa). (See *People v. Walker*, *supra*, 139 Cal.App.4th at p. 804.) But we cannot perceive any "plan" that would explain Smith's conduct on both occasions. As Smith argues, even under the state's theory of the case, the murder was a spontaneous event, not the culmination of an underlying scheme: Smith did not create the conflict between Stephens and Palmer, Smith did not cause Stephens to break Palmer's girlfriend's window, and Smith murdered Stephens within minutes of learning of the broken window. Similarly, while Smith's insinuation of himself into M.A.'s relationship may have been calculated, there is no

indication that his promises to act on her behalf were anything other than spontaneous responses to her reports of being harassed.

The Attorney General contends that the requisite similar features suggesting a common plan are present because in both instances, Smith "befriended the woman who had a boyfriend, initially treated her like his sister, . . . drove a wedge into the woman's relationship with her boyfriend, and either came to her rescue or made it clear that he was capable of doing so." To suggest that Smith had a "plan" or "motive" to interfere in other people's relationships and protect the women he became involved with is just another way of saying that he had a propensity to do those things. Therefore, we conclude that the threats made on M.A.'s behalf were inadmissible character evidence.

Although these threats were the only justification given for the admission of the balance of the M.A. conversations, we need not decide whether this evidence as a whole was admissible on some other ground or whether its admission violated section 352, as Smith claims, because any error was harmless. It is true that in her closing argument the prosecutor relied heavily on these conversations, arguing that they were "[t]he most telling evidence in this case" because they revealed that Smith's motive for killing Stephens was to retaliate on Palmer's girlfriend's behalf. But we disagree with Smith that aside from these conversations "there was virtually no evidence pointing to any improper relationship between" him and Palmer's girlfriend. The telephone records, combined with Smith's ex-girlfriend's testimony and Smith's admission that he talked to Palmer's girlfriend daily during the relevant time period, were more than sufficient to support the conclusion that Smith committed the murder because Palmer's girlfriend reported the broken window to him. While the M.A. conversations may have given the prosecutor the idea to argue that a relationship with Palmer's girlfriend was Smith's motive, there would have been plenty of support for that theory even if the conversations had not been admitted. Finally, we disagree with Smith that this was a close case. As already discussed, there was strong evidence of Smith's guilt, including Adkins's identification and Smith's admissions, and we again find the length of jury deliberations to be of little significance for the reasons given above. Therefore, it is not reasonably

probable that Smith would have obtained a more favorable result had this evidence been excluded (see *Watson, supra*, 46 Cal.2d at p. 836) and, to the extent there was any error of federal constitutional dimension, it was harmless beyond a reasonable doubt (see *Chapman, supra*, 386 U.S. at p. 24).

5. The April 2006 call with Smith's ex-girlfriend.

Among the recordings the prosecution sought to introduce was an April 2006 call containing this short exchange between Smith and his ex-girlfriend:

> [EX]: I'm gonna get up on Slow and I'm gonna get up on Terrance. I'm not playing no more.
>
> [SMITH]: Man, all you - what I need you to do. I already called Vanessa and told Vanessa to tell her dude that you was coming to pick up my money. Call that nigga and tell that nigga I want my money, man. That's what you do. That nigga owe me $500. Get my $500 from that nigga. If that nigga gets smart or remotely close to smart, Twan already know what to do. Call Twan and let Twan know.

The prosecutor stated that she was offering this call "simply to show [Smith's] state of mind and his willingness to actively reach out to people from in custody." Smith's trial counsel objected on relevance grounds, saying, "He's not charged with reaching out to somebody. He's charged with doing something while he's out of custody, which I would argue doesn't have a connection to calling people about money that he's owed on the street . . . ." The trial court admitted the call, saying, "There's some sort of veiled threat in there."

Smith claims that the admission of this call was unduly prejudicial under section 352 and violated his federal due process rights. He did not raise either such objection below, however, and the claim is therefore forfeited.[15] (See *Partida, supra*, 37 Cal.4th at

[15] In arguing that various calls were inadmissible under section 352, Smith notes that when discussion of the jailhouse recordings first began, his trial counsel stated, "The theme of all of my objections throughout this process are going to be one, I object; and two, I will be requesting it to be pared down when we get further on . . . . [¶] . . . So without having to repeat this over and over again, I will submit to the [c]ourt my objection, and if the [c]ourt finds it admissible, I will ask for some type of editing or

pp. 433-434.) Even if he had preserved the claim, we would reject it. Although the call was of minimal relevance, it was extremely short and amounted to nothing more than a vague threat. There was no abuse of discretion under section 352, and the evidence's admission did not render the trial fundamentally unfair.

6. The March 2012 call with R.

In March 2012, Smith had a conversation with a male friend, R., during which they discussed M.A. Smith asked R. to get balloons for M.A. for her birthday. Throughout the portion of the call Smith challenges, he referred to M.A. as a "bitch" and indicated that he did not expect her to be faithful, saying, "I mean, I done told her a hundred times 'cause I don't care who you fuck and what you fuck or how you fuck it."

Smith claims that this excerpt of the call was inadmissible under section 352 and violated his federal due process rights. Although the excerpt's transcript appears in Exhibit 20, the prosecution did not list it in the motion in limine pertaining to the jailhouse recordings. Smith has not pointed us to any discussion of this excerpt in particular or to any ruling on its admissibility. Nor has he identified any objection he made to its admission, on section 352 grounds or otherwise. Therefore, the claim is forfeited. (See *Partida*, *supra*, 37 Cal.4th at pp. 433-434; *Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241, 1252-1253 [argument forfeited by failure to include necessary citations to record].)

Even if the claim were preserved, we would conclude that Smith is not entitled to relief. He argues that "not even the prosecutor herself could articulate an admissible purpose" for this excerpt, but he does not provide a citation or otherwise clarify what he means. The prosecutor included the transcript of this excerpt in a tabbed portion of Exhibit 20 that included conversations relevant to witness-intimidation issues, and the transcripts on either side of it are other parts of a single call during which Smith demonstrates consciousness that he is being recorded and appears to be arranging for R.

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paring down." To the extent Smith suggests that counsel's statement was sufficiently specific to preserve an objection to those calls under section 352 or on federal due process grounds, we disagree.

to track down and send him certain information. Thus, the challenged excerpt is at the very least relevant to provide context for the other two excerpts, the admission of which Smith does not challenge. And although we agree with him that the conversation about M.A. was "degrading," we cannot say that it was unduly prejudicial or resulted in a fundamentally unfair trial, given the multitude of Smith's other statements that were properly admitted. In sum, he fails to convince us that there was any error in the excerpt's admission.

7. The March 2012 call demonstrating frustration with the jail's telephone system.

Finally, Smith challenges the admission of calls he characterizes as "contain[ing] various outbursts by [him] during which he expresses his anger at the jailhouse phone system." Smith does not make clear which calls he means to challenge. He refers to the parties' and trial court's discussion of a certain set of calls, but the scope of that set is not apparent from the record. We will therefore consider only the two transcripts which he specifically cites, both of which reflect portions of a March 2012 call during which he speaks to another man, L., and M.A.

Both excerpts are in the portion of Exhibit 20 pertaining to witness intimidation. In the first excerpt, Smith asked whether L. "kn[ew] any of them niggas from the Bottoms" and then told L. that he would write him a letter after suggesting that they could not be more specific on the telephone. Before speaking to L., Smith expressed frustration because his calls kept being terminated for three-way calling, which he believed was happening because he was getting close to trial. Similarly, in the second excerpt, he complained to M.A., "The [g]od damn police keep playing with my phone because I'm getting ready to start trial. They keep hanging the fucking phone up in the middle of conversations. I'm - I'm irritated. . . . [¶] . . . I'm ready to fuck somebody up[.]" Smith then told M.A. that she had to visit him "so [he could] have [her] take care of this shit."

Smith's trial counsel admitted that the larger set of calls had some relevance based on "the theory of intimidation." Although he did not "have a legal objection as far as

admissibility," he objected under section 352 on the grounds they were "redundant." The prosecutor responded that all the calls were necessary for context and that their "probative value significantly outweigh[ed] any consumption of time." As to the exchange with M.A. specifically, the prosecutor explained, "The main purpose of this excerpt is that fact that [Smith is] talking to [M.A.] and saying, 'I need you up here. I need you to take care of stuff.' If you fast forward a week[,] he's in a visit holding information up to the glass wall. And then in another call he's saying, '[Y]ou, [L.] or [R.] need to get in touch with old girl so she can give you the information that I passed to her at the visit.' [¶] Some of it takes . . . inference, but that's the import of that call. [Smith] needs [M.A.] to be his little relay."

The trial court ruled that the calls were admissible under section 352. Although it agreed with Smith's trial counsel that it was not always easy to understand the relevance of a particular call in isolation, it also agreed with the prosecutor "that in context one call builds on the next." After observing that the calls contained a large amount of "highly probative" evidence, the court found that "in the sense of undue prejudice, these calls are some of the least unduly prejudicial calls in the entire group. . . . [T]hey have less in the way of curse words, less in the way of the N word, less sexual stuff[.]" The court also found that the calls would not require an undue consumption of time.

Smith includes these excerpts showing his frustration with the jail's telephone system in a general argument that each recording whose admission he challenges under section 352 and based on federal due process was "completely irrelevant" and did not bear on whether he "committed the charged crime." But he does not address the trial court's finding that the larger set of calls provided necessary context or explain why his passing of information to M.A. was irrelevant. Nor does he attack the court's determination that the calls were minimally prejudicial. As a result, he fails to convince us that the court erred.

D. Smith's Trial Counsel Did Not Render Ineffective Assistance by Failing to Seek a Mistrial Based on the Prosecutor's Closing Remarks About Smith's Character.

Smith also claims that his trial counsel rendered ineffective assistance by failing to seek a mistrial after the prosecutor relied on Exhibit 20 in closing argument to make numerous comments about Smith's character. We are not persuaded.

1. Additional facts.

After the trial court ruled on the admissibility of Exhibit 20, the prosecutor requested guidance on the extent to which she could refer to what the jailhouse recordings revealed about Smith's criminal conduct other than the murder. After recognizing that it was impossible "to thoroughly cleanse that [evidence] from the case," the court told the prosecutor that she could not rely on Exhibit 20 as character evidence, except the portions admitted under section 1101(b) as evidence of a common plan or scheme, but that she could use it "as the evidence is relevant . . . to other aspects of the case."

The prosecutor began her closing argument by discussing Smith's character as revealed in "almost 11 hours of recorded statements and jail calls." Smith's challenge involves comments made in the following portion of the argument, to which his trial counsel made no objection:

> "Throughout this trial you have had the opportunity to see who . . . Smith is. How he thinks, and what he is capable of. [¶] I told you when I began my opening statement . . . how incredibly arrogant and manipulative and offensive he is.
>
> . . . The defendant by his own words is a hothead. He fought in school, he fought in jail. He still fights in jail. . . . [¶] The defendant stated he is known for playing with guns. At any given time if he doesn't have a gun he can get one real quick. So if he doesn't have one on him, he can find one. [¶] He's not afraid to shoot shit up. . . . [I]mmediately following that graphic sexual discussion [that was redacted] he stated, 'People wouldn't be saying that if I was on the street,' because people on the street know what the defendant is capable of.

> He stated he doesn't care about [Stephens's] getting killed. He doesn't care about how [Stephens's] family felt about it. [¶] . . . [¶] He has described himself as a professional criminal. He has stated that he knows how to act in front of mamas, but once he's by himself he's a different person and he turns into that street mentality person. [¶] He loves trouble, he doesn't accept bullshit from anybody. . . . [¶] Even though he's in jail he has a very long arm. He reaches out to his criminal associates on the outside, gets them to do things for him. . . .
>
> He says that people always take his kindness for weakness. But then when he 'goes the fuck off' and start[s] really showing his other side, then everybody thinks he's wrong. [¶] You've seen his other side, you know what his other side is. He lies when it benefits him. . . . [H]e's a self-admitted liar. . . . [¶] He cheats. He cheats on his girlfriends, he cheats when it benefits him, and he steals. [¶] . . . [¶] I'm going to use my own word now to describe [Smith], and that is despicable."

2. Smith has not demonstrated that the trial court would have granted a mistrial had his trial counsel objected to the prosecutor's statements.

As discussed above, a claim of ineffective assistance of counsel requires a defendant to show both that counsel's performance was deficient and that the deficient performance caused prejudice. (*Strickland, supra*, 466 U.S. at p. 687; *People v. Centeno*, *supra*, 60 Cal.4th at p. 674.) The first *Strickland* prong requires a showing that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms," and we "defer[] to counsel's reasonable tactical decisions." (*Mai*, *supra*, 57 Cal.4th at p. 1009.) The second *Strickland* prong requires a showing of "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*Ibid.*) We need not address whether the prosecutor's comments in closing were improper or whether Smith's trial counsel should have objected to them because Smith fails to demonstrate the requisite prejudice.

Smith claims that prejudice is established because had his trial counsel objected to the prosecutor's comments in closing and moved for a mistrial, the trial court would have granted the motion. " '[A] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the . . . court is

vested with considerable discretion in ruling on mistrial motions.' " (*People v. Alexander* (2010) 49 Cal.4th 846, 915; see also *People v. Williams* (2006) 40 Cal.4th 287, 323 [improper behavior by prosecutor does not necessarily require grant of mistrial motion].) Because a mistrial requires a showing of incurable prejudice, the second *Strickland* prong "is automatically satisfied if the mistrial motion itself has substantial merit." (*People v. Haskett* (1982) 30 Cal.3d 841, 855, fn. 4.) Thus, although it is "a rare case in which the merits of a mistrial motion were so clear that counsel's failure to make the motion would amount to ineffective assistance," prejudice exists "if the motion for mistrial bore strong potential for success." (*Id.* at p. 854.)

Although Smith recognizes that a successful mistrial motion requires a finding of *incurable* prejudice, he does not address why, assuming the prosecutor's argument was improper, an admonition or instruction by the trial court would have been ineffective. He cites a number of cases for the proposition that the challenged statements constituted prosecutorial misconduct, but his only other argument as to why a mistrial motion would have been granted is that the court "ma[de] clear" in responding to the prosecutor's request for guidance that it would have done so. In the cited comments, the court stated only that it would "entertain objections" from Smith's trial counsel if the prosecutor improperly relied on the character evidence, "and whatever the remedies are are whatever . . . remedies . . . are available." We fail to perceive how these statements indicate that the court intended to grant a mistrial if the prosecutor violated the court's ruling. Indeed, among the available remedies was an admonition or instruction to the jury to disregard any improper statements by the prosecutor. Because Smith has not demonstrated why an admonition or instruction would have been ineffective, he is not entitled to relief.

E. Any Error in the Omission of a Sua Sponte Heat-of-passion Instruction Was Harmless.

Smith next claims that the trial court erred by not instructing the jury on the lesser included offense of voluntary manslaughter based upon a sudden quarrel or heat of passion. He argues that there was sufficient evidence he killed in response to Stephens's

provocatory conduct against Palmer's girlfriend. We conclude that any error in the omission of a heat-of-passion instruction was harmless.

After the close of evidence, the trial court and the parties discussed jury instructions. When they reached the topic of lesser included offenses, the court stated that it did not "see any evidence whatsoever in this case of heat of passion." Both counsel agreed, and the court determined no such instruction was warranted. The court did decide, however, that in addition to instructions on first degree and second degree murder, an instruction on imperfect self-defense was appropriate given certain evidence about Stephens's aggressive nature and previous violent encounters, including his breaking of Palmer's girlfriend's window.

Accordingly, the jury was instructed under CALCRIM No. 571 that Smith was guilty of the lesser included offense of voluntary manslaughter if he acted unreasonably in self-defense. It was also instructed under CALCRIM No. 521 that Smith was guilty of first degree as opposed to second degree murder if "he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts that caused death. [¶] . . . A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated."

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) A person who kills while acting "upon a sudden quarrel or heat of passion"—even if exercising a sufficient "measure of thought . . . to form . . . an intent to kill"—has "a mental state that precludes the formation of malice." (§ 192, subd. (a); *People v. Beltran* (2013) 56 Cal.4th 935, 942.) Thus, the offense of murder is reduced to voluntary manslaughter when the defendant acted upon a sudden quarrel or in the heat of passion. (*Beltran,* at p. 942.) A person acts upon a sudden quarrel or in the heat of passion if he or she "acts without reflection in response to adequate provocation." (*Ibid.*) Provocation is legally adequate if it " ' "would cause the ordinarily reasonable person of

average disposition to act rashly and . . . from . . . passion rather than from judgment." ' " (*Ibid.*)

A trial court has the duty "to instruct fully on all lesser necessarily included offenses supported by the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) For this duty to arise, "there must be ' "substantial evidence" [citation], " 'which, if accepted . . ., would absolve [the] defendant from guilt of the greater offense' [citation] but not the lesser." ' [Citation.] . . . '[S]ubstantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself' [citation] and 'even when as a matter of trial tactics a defendant . . . fails to request the instruction.' " (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137-1138.)

As a preliminary matter, the Attorney General argues that the invited-error doctrine bars this claim because Smith's trial counsel agreed with the trial court that there was insufficient evidence to support a heat-of-passion instruction. " 'The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. . . . [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.' " (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) Here, counsel did not affirmatively request that a heat-of-passion instruction not be given, and there is no other indication that his acquiescence to the court's position was a matter of tactics as opposed to a purported oversight about the state of the evidence. (See *People v. Cooper* (1991) 53 Cal.3d 771, 830-831.) In particular, as Smith points out, counsel clearly was not pursuing a strategy of forcing the jury to decide between a murder conviction and acquittal because counsel agreed to the imperfect self-defense instruction. As a result, we disagree that the invited error doctrine applies.

Turning to the merits, we need not decide whether there was sufficient evidence to trigger the trial court's sua sponte duty because any error in failing to give a heat-of-passion instruction was harmless. Initially, the parties disagree on the applicable standard

for assessing prejudice. Smith contends that the federal constitutional standard, which requires reversal unless it appears beyond a reasonable doubt that an error did not contribute to the verdict, applies to this claim. (*Chapman*, *supra*, 386 U.S. at p. 24.) The Attorney General responds that the applicable standard is the state constitutional standard, which requires reversal only if there is a reasonable probability that the error contributed to the verdict. (*Watson*, *supra*, 46 Cal.2d at p. 836.) It is currently unsettled which standard applies to assessing such an error in the omission of a heat-of-passion instruction. (See *People v. Peau* (2015) 236 Cal.App.4th 823, 830.) The case on which Smith relies, *People v. Thomas* (2013) 218 Cal.App.4th 630, "held that the *Chapman* standard applied to a defendant's claim that the trial court erred by not giving a *requested* heat-of-passion instruction," but "*Thomas* does not necessarily resolve whether an error in failing to give such an instruction sua sponte is also one of federal constitutional dimension." (*Peau*, at p. 830, italics in original; see *People v. Millbrook*, *supra*, 222 Cal.App.4th at pp. 1145-1146; *Thomas*, at pp. 633, 643-644.)

We need not decide here whether the federal or state standard for assessing prejudice applies because any error was harmless under both of them. (See *People v. Peau*, *supra*, 236 Cal.App.4th at p. 830.) " 'Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions.' " (*Ibid.*, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 646.) In particular, as we explained in *Peau*, a defendant's "conviction of first degree murder renders any failure to give a heat-of-passion instruction harmless because the jury necessarily found that the murder was willful, deliberate, and premeditated." (*Peau*, at p. 830.) *Peau* relied on *People v. Wharton* (1991) 53 Cal.3d 522, which held that a first degree murder verdict establishes "a 'state of mind, involving planning and deliberate action[, that] is manifestly inconsistent with having acted under the heat of passion.' " (*Peau*, at pp. 830-831, quoting *Wharton*, at p. 572.)

We recognize that here, unlike in *Peau*, no instruction on provocation was given. (See *People v. Peau*, *supra*, 236 Cal.App.4th at p. 829.) But neither *Peau* nor *People v.*

Wharton, *supra*, 53 Cal.3d 522 rested its holding on the giving of other instructions related to the concept of heat of passion. Indeed, *Peau* specifically distinguished *People v. Berry* (1976) 18 Cal.3d 509, which held that a first degree murder verdict did not render the failure to give a requested heat-of-passion instruction harmless (*Berry*, at pp. 512, 518), on the basis that *Berry* considered "whether the error was harmless because the jury received some instruction on the concepts of heat of passion and provocation, not whether the error was harmless because the jury found the murder was willful, deliberate, and premeditated and such a finding was inconsistent with a finding that the defendant acted in a heat of passion." (*Peau*, at pp. 831-832.) Contrary to Smith's position otherwise, the jury *did* resolve the issue of provocation against Smith despite the absence of instruction on that concept because the jury necessarily found that he did not act "rashly, impulsively, or without careful consideration." As a result, we hold that it is not reasonably probable that Smith would have obtained a more favorable result had the trial court given a heat-of-passion instruction (see *Watson*, *supra*, 46 Cal.2d at p. 836) and any error was harmless beyond a reasonable doubt (see *Chapman*, *supra*, 386 U.S. at p. 24).

F. Smith's Right to Be Present Was Not Violated by His Absence from a Hearing Involving a Juror's Contact with an Outside Party.

Smith contends that his absence from a hearing to determine whether juror misconduct had occurred violated his federal and state constitutional rights and state statutory law. We conclude that he had no right to be present at the hearing and that, even if he had, any violation of that right was harmless.

In the middle of the trial, the trial court learned that one of the jurors was worried about her contact with a person in the court elevator. The court immediately held a hearing at which the juror and both sides' counsel were present but Smith was not. The juror explained that a few days beforehand, she had entered the elevator on her way back from lunch and "a young guy," who was the only other person inside, held the door for her. After she thanked him, "he just made a comment to [her] that his friend had been killed and that he was here for the trial. And he just shook . . . his head and said, '[S]ad,'

and [she] just said, 'I bet.' " She later became concerned that the man could have been a witness in Smith's case and therefore reported the incident.

The trial court stated that there was another murder trial going on across the hall and asked the juror whether she had seen the man once she returned to the courtroom. She said that she was unsure, as he may have been in her "peripheral vision" but she had not looked directly at anyone in the audience. In response to the court's questions, the juror confirmed that she had not mentioned the incident to any other jurors and that it had not influenced her consideration of the case in any way.

After permitting the juror to take her seat, the trial court discussed the issue with counsel. Addressing Smith's trial counsel, the court stated, "So, I didn't ask you ahead of time if you would waive your client's appearance. What occurred was I asked the clerk to tell me once the juror was down. [The clerk] came and told me that the juror was looking very nervous, and so I just kind of cut to the chase. Let me ask you now[,] do you [have] any objection to your client['s] not having been included in that?" Smith's counsel responded, "No objection." Smith's counsel then indicated that he was not concerned about the incident, although he asked that Stephens's family be reminded to be careful not to have contact with jurors. The court stated that it would tell the family at the next break.

Under the federal and state Constitutions, " 'a criminal defendant accused of a felony has the right to be present at every critical stage of the trial.' " (*People v. Rundle* (2008) 43 Cal.4th 76, 133.) Specifically, a defendant has a right under the Sixth Amendment's Confrontation Clause to be personally present if his or her presence is necessary to vindicate the right to effective cross-examination; a right under the Fourteenth Amendment's due process clause to be present " 'at a "stage . . . that is critical to [the] outcome" [if] "his [or her] presence would contribute to the fairness of the procedure" ' "; and a right under article I, section 15 of the California Constitution to be present at a proceeding that bears " ' "a ' " 'reasonably substantial relation to the fullness of his [or her] opportunity to defend against the charge.' " ' " ' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1231.) "A defendant may waive his or her constitutional right to be

present during a critical stage, provided the waiver is knowing, intelligent, and voluntary." (*Rundle*, at pp. 133-134.)

Under section 977, a defendant in a felony case must "be personally present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence." (§ 977, subd. (b)(1).) The defendant must also "be personally present at all other proceedings" unless he or she executes a written waiver. (§ 977, subd. (b)(1)-(2).) "[N]either this statutory mandate nor the constitutional right to be present at trial extends to chambers or bench discussions outside the presence of the jury when those matters do not bear a reasonably substantial relation to the opportunity to defend." (*People v. Holt* (1997) 15 Cal.4th 619, 706.)

We review de novo Smith's claim that the trial court erroneously excluded him from the hearing. (See *People v. Waidla* (2000) 22 Cal.4th 690, 741.) To obtain relief, Smith must " 'demonstrate that his absence prejudiced his case or denied him a fair and impartial trial.' " (*People v. Horton* (1995) 11 Cal.4th 1068, 1120-1121.) To the extent that any error in a defendant's exclusion implicates a federal constitutional right, we ask whether the error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24; *People v. Johnson* (2013) 221 Cal.App.4th 943, 950.)

Initially, although neither party raises the issue, we address whether Smith forfeited this claim based on his trial counsel's after-the-fact acquiescence to Smith's absence from the hearing. The case law makes clear that, where the right to be present exists, a defendant must personally and affirmatively waive that right. Here, there is no indication that counsel's position was based on any consultation with Smith. As a result, we will consider the claim on the merits. (See *People v. Marks* (2007) 152 Cal.App.4th 1325, 1334, fn. 3 [right-to-presence claim not forfeited where "absolutely no evidence in the record of a knowing and intelligent waiver of [the defendant's] right to be present"].)

Smith argues that his presence was necessary to ensure the trial's fairness and his opportunity to defend because he could have assisted his trial counsel in questioning the juror. Smith claims that because he knew Stephens and they "ran in the same circles,"

Smith "had unique knowledge to assist counsel" in determining "the elevator man's identity, his relation to the victim in the charged case, and whether he was still present in the courtroom." We are not persuaded that Smith's potential input on these issues transformed the hearing on the juror's encounter into a critical stage of the trial at which Smith had the right to be present. First, Smith points to no authority that a defendant has a Sixth Amendment right to cross-examination of a *juror*, and we are aware of none. Second, he does not explain how his input on the identity of the man in the elevator was necessary to ensure that the hearing's outcome was fair: the key issue was whether the juror had been improperly influenced by her contact with the man, not who he actually was. (See *People v. Cowan* (2010) 50 Cal.4th 401, 507.) And finally, the hearing was held outside the jury's presence and had no bearing on Smith's opportunity to defend against the charge, so he therefore had no state constitutional or statutory right to be present at it. (See *People v. Cole*, *supra*, 33 Cal.4th at p. 1231; *People v. Johnson* (1993) 6 Cal.4th 1, 17-19 [defendant had no right to be present at hearing involving juror misconduct].)

Even if Smith had had a right to be present at the hearing, his absence from it was harmless. According to Smith, at best his presence would have increased the chance of determining whether the man in the elevator was connected to Stephens. But there is no indication that the trial court would have been more likely to remove the juror if the man in the elevator had been conclusively identified as a friend of Stephens's. Even if we assume that the man was indeed Stephens's friend, the contact between the juror and the man was " 'de minimis' " and did not relate to the evidence at trial except in the most general sense. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 507.) In addition, the juror unequivocally stated that the contact had not influenced her in any way and had not affected her ability to be fair. Thus, there was no evidence on which the court could have found a substantial likelihood that the juror was biased. (See *People v. Nesler*, *supra*, 16 Cal.4th at pp. 578-579.) As a result, we conclude beyond a reasonable doubt that even if Smith had been present at the hearing, the hearing's outcome would have been the same. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

G. No Cumulative Error Appears.

Finally, Smith argues that the cumulative effect of the purported errors he has identified requires reversal of his conviction. The only definite error we have identified was in the admission of portions of conversations with M.A., which was not prejudicial for the reasons given. To the extent there may have been other errors, "[e]ach . . . was harmless in itself, and on this record the whole of them did not outweigh the sum of their parts." (*People v. Roberts* (1992) 2 Cal.4th 271, 326.) Smith was not entitled to a perfect trial, and we are satisfied that he received a fair one. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1057.) Therefore, his claim of cumulative error fails.

III.
DISPOSITION

The judgment is affirmed.

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Humes, P.J.

We concur:

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Margulies, J.

_____

Banke, J.

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